

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

In re A.H. et al., Persons Coming Under the
Juvenile Court Law.

S.C. et al.,
Petitioners,

v.

THE SUPERIOR COURT OF CONTRA
COSTA COUNTY,

Respondent;

CONTRA COSTA COUNTY CHILDREN
AND FAMILY SERVICES BUREAU,

Real Party in Interest.

A146316

(Contra Costa County
Super. Ct. Nos. J14-00853, J14-00854,
J14-00855)

I.

INTRODUCTION

S.C. (mother) and E.H. (father) seek review by extraordinary writ of a juvenile court order setting a hearing pursuant to Welfare and Institutions Code section 366.26,¹ to consider termination of parental rights and to select a permanent plan for their three children, four-year-old A.H., two-year-old E-J.H., and one-year-old E.H. Both parents contend they were entitled to an additional period of reunification services. Mother

¹ Statutory references are to the Welfare and Institutions Code unless otherwise stated.

further contends the juvenile court erred by (1) failing to consider whether the children could be safely returned to her care; and (2) reducing her visitation to twice monthly visits with the children. Father separately contends that he was denied his constitutional right to the effective assistance of counsel. We reject these contentions and deny both writ petitions on the merits.

II.

STATEMENT OF FACTS

A. Background

In August 2014, the Contra Costa County Children and Family Services Bureau (the bureau) received a referral that mother and father's son, E.H., had tested positive for amphetamine at birth and that mother tested positive for amphetamine and ecstasy.

A bureau social worker interviewed mother, who claimed surprise and appeared distressed to learn that she and E.H. both had positive drug tests. Mother acknowledged her long history of drug abuse, but reported that she had been clean since February 2013. When she was informed that she also had a positive test the previous month, mother adamantly denied using any substances during her pregnancy with E.H., aside from two prescribed medications. She said that she took Wellbutrin for a few months in her early pregnancy because she was trying to quit smoking, but stopped taking it in May. In addition, for a few weeks before E.H. was born, she took Zoloft for depression. When the social worker said it was unlikely those medications produced false positive drug tests, mother recalled taking "half a Norco" a few weeks earlier because of a toothache, and that she occasionally took Benadryl because her doctor said it would help with anxiety. Again, the social worker expressed doubt those medicines caused false positive test results.

Mother began to cry as she told the social worker about an incident that occurred the previous week. She agreed to give a friend a ride to a bingo hall even though she knew her husband would not approve. On the way, they stopped to get sodas and the friend put methamphetamine in her own can. At the bingo hall, they got out of the car to say goodbye and placed their sodas on top of the car. Mother surmised that the cans got

switched, and she ended up taking the soda that had drugs added to it. She worried out loud that father would be very mad about what had happened.

Mother told the social worker about her other children and her drug abuse history. She had her first child when she was 16, and was living in a group home, and a second child when she was 21. She lost custody of those boys because she was “running around with their father . . . and doing meth,” and was in and out of jail for various drug offenses. When mother had a third child in 2006, she was seriously abusing drugs. The baby girl tested positive for methamphetamine at birth, entered foster care shortly thereafter, and was adopted by her foster family. In 2011, mother began a relationship with father, who also had substance abuse problems. Mother was pregnant with their daughter A.H. when she and father were arrested on a drug charge, entered treatment programs and got clean. Mother stayed clean for several months but relapsed in December 2012. She was arrested in February 2013 for “something [she] didn’t do,” and was in custody when she discovered she was pregnant with the couple’s second daughter, E-J.H. In March 2013, mother was placed on probation which ended in June 2014. She and father married in February 2014.

The social worker met father at the home of the paternal grandmother (grandmother), where the couple lived with their two daughters. A.H. and E-J.H. appeared happy and well cared-for in grandmother’s home. Father and grandmother expressed surprise about mother’s relapse; they thought she had been clean for over a year and was doing very well. When the social worker told father about mother’s conclusion that she may have accidentally consumed the drugs, he responded that the incident was really upsetting whether accidental or not because mother should not have been associating with that friend. Father reported that the family had a strong support network in the Jehovah’s Witness congregation, and that he had undergone a lengthy process to join their ministry which was very supportive of father and mother’s recovery.

Father reported that his substance abuse history dates back to the late 1990’s, following his discharge from the military. After multiple arrests for drug related crimes, father experienced a long period of sobriety from 2003 until 2009, when his brother

committed suicide, which caused him to start using again. In 2011, he and mother were arrested and ordered into treatment, and he has been sober ever since. Father stated that he was very active in the recovery community, visited his former program once a week, was a sponsor for a current resident, and was being recruited as a counselor for an inmate recovery program.

Father also told the social worker that his recovery and overall progress in life had been facilitated by a January 2013 diagnosis of Post-Traumatic Stress Disorder (PTSD) and bipolar disorder. Father reported that he receives monthly psychiatric treatment, and that he takes Prazosine for his PTSD, Lithium for his mood disorder, and Zoloft for his depression.

On August 7, 2014, the bureau filed dependency petitions on behalf of A.H., E-J.H. and E.H., alleging jurisdiction under section 300, subdivision (b) (section 300(b)) as a result of mother's "serious and chronic substance abuse problem that impairs her ability to parent" The petitions were supported by allegations that: (1) mother tested positive for amphetamines and ecstasy at the time of E.H.'s birth; (2) E.H. also had a positive toxicology for amphetamines at birth; (3) mother's history of abusing drugs and alcohol dated back to when she was 15 years old; (4) mother's substance abuse related criminal history extended from 2003 to 2013; and (5) mother has two older children in legal guardianship with their maternal grandmother and another older daughter with whom she failed to reunify in 2007 due to "pervasive substance abuse."

At the August 8, 2014 detention hearing, the juvenile court adopted the bureau's recommendation to detain the children from mother, but allow them to remain in the care of their nonoffending father, and it also ordered that mother was not to reside in grandmother's home. On September 16, mother stipulated to the court's jurisdiction over the children pursuant to amended section 300(b) petitions which alleged that mother "has a serious and chronic substance abuse problem that impairs her ability to parent in that" she tested positive for amphetamines at the time of E.H.'s birth and that E.H. was born with a positive toxicology for amphetamines.

A disposition hearing was scheduled for October 29, 2014. The bureau recommended that the children be adjudged dependents, that they remain in the care of father with family maintenance services, and that mother be afforded reunification services. Since the last report, mother had fully relapsed. Initially she appeared motivated to reunify with her family; she registered for random drug testing and started an outpatient treatment program. However, she missed her first several tests and when she finally tested, the results were positive for amphetamine and methamphetamine. When confronted with this record, mother questioned the dirty test result, claimed she had tested several other times but failed to keep her receipts, and complained of struggles with housing and depression. The social worker gave her referrals to mental health services, a primary care physician to address her depression, and inpatient and outpatient treatment programs.

At the beginning of this reporting period, father was supportive of mother and appeared committed to his marriage and family. But, he subsequently acknowledged that mother was digressing back into drug dependency. Father also reported that mother had violated the court order to stay away from the family home. In mid-September she showed up late one night, honked her car horn and yelled at father as she stood outside his bedroom window. On October 4, she was outside the home again, honking her horn and yelling. Then she came into the yard, opened a screen door, and grabbed E-J.H. who was standing there trying to see what was going on. Father retrieved the child while grandmother called the police, but mother left before they arrived. On October 12, mother was outside the house again, acting angry and erratic. She threatened to take the children and to kill herself, causing father to call the police again. On October 15, father told the social worker he was considering a restraining order and legal separation from mother. Mother was in full denial about her substance abuse and father told the social worker that if he “has to choose between mother and the children, he will put his children’s wellbeing and safety first, even if that means cutting mother out of his life.”

At the October 29, 2014 hearing, the juvenile court suspended mother’s visits in light of her recent behavior, advised the parties of its intention to grant a temporary

restraining order as requested by the children's counsel, and continued the matter for disposition. On November 20, the court issued a temporary restraining order requiring mother to stay away from father and the children. The disposition hearing was continued again to December 18. On December 2, mother entered a recovery program for women with alcohol and other substance abuse problems that had a 90-day minimum residency requirement.

At the December 18, 2014 continued disposition hearing, the juvenile court ordered the courtroom deputy to drug test mother, and she produced a negative result. The court terminated the restraining order and reinstituted weekly supervised visits for mother. However, the court also ordered father to drug test, and his results were positive. Father admitted using amphetamines, and the court ordered the bureau to file new petitions. The children were detained from father, but allowed to remain with grandmother in her home. Disposition on the original petitions was continued again.

In December 2014, the bureau filed subsequent petitions under section 342 on behalf of A.H., E-J.H. and E.H. alleging jurisdiction under section 300(b) because of father's "significant substance abuse problem which hinders his ability to provide adequate and appropriate care." The petitions were supported by factual allegations and that father (1) tested positive for methamphetamine on December 18, 2014; and (2) admitted using methamphetamine five to ten times between December 15, 2014, and January 12, 2015.

At a January 12, 2015 hearing, father contested jurisdiction under the subsequent petitions, and mother contested disposition on the original petitions. Father was drug tested at the hearing and produced another positive result for amphetamines. Because of that positive test, the court ordered that father's visitation was to be supervised by the social worker rather than by grandmother. The matters were continued for a contest on the supplemental petitions, with the disposition contest to trail.

At a February 11, 2015 contested hearing on the subsequent petitions, mother and father both produced negative drug test results. After hearing testimony from father and

considering other evidence, the court sustained the jurisdiction allegations in the subsequent petitions.

At a February 26, 2015 contested disposition hearing, both parents tested positive for methamphetamine. The bureau filed an addendum report recommending that the court continue the children's placement with grandmother, but formally remove them from father and provide him with reunification services. The bureau reported that father had been "somewhat candid" about his relapse, but that he was in "denial" about its seriousness and impact on the dependency proceedings. The court adopted the bureau's disposition recommendations, continued the dependencies and ordered services and weekly supervised visitation for both parents.

B. Status Review

1. Bureau Report and Recommendation

A six-month review was set for August 10, 2015. The bureau's recommendation was to terminate reunification services for both parents and to schedule a section 366.26 hearing to select an appropriate permanent plan for the children. Parents disagreed with this recommendation, contending they had complied with their case plans and should be afforded additional services. The bureau reported that neither parent had complied with their case plans.

Mother entered residential treatment on December 14, 2014, but was asked to leave on February 4, 2015, after producing a positive drug test. She failed to test during March, April and May. In May, she was arrested on a burglary charge, received a sentence of three years probation and was released on June 10. Mother completed only one drug test in June, which was positive. She re-entered residential treatment on July 7, 2015.

Father was referred for drug testing on January 27, 2015. He produced two positive tests in February and failed to appear for two others. He did not drug test in March, April or May. He entered a residential treatment program in Oakland on June 1, but was asked to leave on June 22 after another resident reported his property was

missing. He produced negative drug tests on June 24 and July 2 and was accepted into another residential program on July 6, 2015.

2. Court Hearings

At an August 10, 2015 hearing, the juvenile court inquired about the status of the children's caregiver and whether she was abiding by the court's order that father not have contact with the children except as supervised by the bureau. The children's counsel reported that grandmother was abiding by the order, had changed her locks, and set appropriate boundaries. The children were happy in their placement where they had lived since before the dependency, and grandmother was willing to give them a permanent home if necessary. The status review was then continued for a contest.

At the September 10, 2015 contested hearing, the county provided a brief update that both parents were in residential treatment programs and then submitted on the bureau reports. The children's counsel agreed with the bureau's recommendations. Mother called the bureau social worker as a witness and father testified on his own behalf.

a. Social Worker's Testimony

Denise Spolerich testified that she received good reports about parents from their respective treatment programs, and both were producing negative drug tests. Spolerich opined that she would have been notified if either parent had violated any program condition. Both parents participated in weekly supervised visits with no reported concerns.

Under cross-examination, Spolerich acknowledged that during the brief period that she had been assigned to this case (since June 2015), she had not had significant contact with either parent. But, she reviewed the case file and had talked with parents earlier that day.

Spolerich testified that, shortly after she was assigned to this case, father entered a program which prohibited him from having contact with her, and after he was terminated from that program, Spolerich was not able to contact him. However, when she talked with father before the hearing, they discussed his relapse and he showed insight about what happened. Spolerich believed that father had been living with his father when he

was not in a residential program. She did not know where mother lived when she was not in jail or in a residential program.

Spolerich testified that her main concern during the period this case was assigned to her was that the parents get into programs, which they both did. When Spolerich spoke to the parents that morning, they informed her of their plans to get back together after completing their residential programs. They also told her that they spent weekend passes together at the paternal grandfather's home. Spolerich testified that she was very encouraged by the progress of both parents; they were on course to complete residential programs in October and had plans to follow up with outpatient programs.

b. Father's Testimony

Father acknowledged that the reason his children were taken from his care was because of his drug use, but he testified that he was addressing that problem by participating in a program and working on relapse prevention. Father testified that he "[a]bsolutely" intended to complete his program and that he had an aftercare plan which included outpatient treatment and the option to do an additional residential program at Diablo Valley Ranch (DVR) if that became necessary. Father opined that when he completed the DVR program on a prior occasion, he really was not sober, but this time would be different. Father believed that he had succeeded in maintaining positive relationships with the children through supervised visitation, and he confirmed that he planned to reunite with mother once they completed their programs. They had talked about going to counseling together, but had not made any plans because they were in separate programs.

Father testified that he began using drugs when he was 14 and that he is now 50 years old. He had participated in three residential treatment programs, the longest of which lasted for six months in 2011. The two drugs he has abused are methamphetamine and alcohol. Alcohol is his trigger for drug use, but there have been long periods when he only abused alcohol. Father denied that mother's drug use is a trigger for his own, but also testified that his most recent relapse in November 2014 began when he found mother's drugs and took them for himself. Father admitted that he and mother used drugs

together from December 2014 until March or April 2015. Father continued to use drugs in May because he was in denial about his problems until he entered treatment in June.

C. The Juvenile Court Order

At the conclusion of the hearing, the court prefaced its findings by observing that this matter was originally set as a six-month review, but that the 12-month deadline was only eight days away. Therefore, the court made findings for both a six-month and 12-month review. Among other things, the court found that (1) there was not a substantial probability that the children could be returned to their parents by the 12-month date, which was September 18, 2015, and (2) the evidence did not support a finding of a substantial probability that the children could be returned home if services were extended to 18 months. Accordingly, the court continued the children's dependency, terminated services to both parents, and scheduled a section 366.26 hearing.

The court's findings tracked the bureau's recommendations, with the exception of the visitation recommendation. The bureau recommended monthly visits, but both parents requested that the weekly visitation schedule be maintained. The court resolved this disagreement by ordering twice-monthly supervised visits for both parents.

III.

MOTHER'S PETITION

A. Placement With Mother

Mother first contends that the juvenile court erred by failing to consider whether the children could be safely placed with her in her residential treatment program. Section 366.21, subdivisions (e) and (f) outline several circumstances that the court "shall" consider at the six and 12-month status review hearing, including whether the dependent child can be returned to the custody of a "parent who is enrolled in a certified substance abuse treatment facility that allows a dependent child to reside with his or her parent." Isolating that circumstance, mother contends that this case must be remanded so the juvenile court can comply with the "require[ment]" that it consider placing the children with mother in her residential program.

First, mother forfeited this argument by failing to raise it below. (*In re Wilford J.* (2005) 131 Cal.App.4th 742, 754.) Second, mother's contention that the juvenile court was required to make an explicit finding about whether or not to place the children in her residential treatment program is not compelled by the language of section 366.21 or supported by any case authority. Third, substantial evidence supports the juvenile court's finding that the children could not be returned safely to mother at the time of the 12-month status review, whether or not she was in a program. At that late stage in the dependency proceedings mother had only recently begun to engage in services and had not demonstrated her ability or inclination to care for her children safely.

B. Denial of Additional Services

Mother next contends that the juvenile court should have provided her with additional reunification services. Because the children could not be safely returned to the parents' home at the 12-month review, the juvenile court was not authorized to extend the reunification period to the 18-month deadline unless it found that: (1) reasonable services had not been provided; or (2) there was a substantial probability the children would be returned to the physical custody of their parents and "safely maintained in the home within the extended period of time." (§ 366.21, subd. (g)(1).)

Here, mother does not dispute that she was provided reasonable services, but she does argue that there was a substantial probability that the children would be returned to her care had she been provided services until the 18-month deadline. To support this contention, mother relies on her record of consistent visitation and evidence that showed she was doing "wonderfully" in her program at the time that the 12-month review was conducted.

Substantial evidence supports the juvenile court's finding that there was no substantial probability of returning the children to mother's physical custody within the extended 18-month period. Mother has already lost custody of three children because of chronic drug abuse and criminal activities. She continued to engage in that dangerous conduct throughout the lives of her three youngest children, even while she was receiving reunification services. Indeed, the record shows that mother completely failed to engage

in any services until very late in this case. In light of this evidence, mother's participation in a highly structured drug treatment program for a few weeks prior to the 12-month review was insufficient to demonstrate either significant progress in resolving the problems that led to the children's removal, or mother's capacity to complete the objectives of her treatment plan by the 18-month deadline. (§ 366.21, subd. (g)(1)(B), C).)

C. The Visitation Order

Finally, mother contends that the visitation order authorizing twice monthly supervised visits was error because there was "absolutely no evidence of a change of circumstances justifying a change in the visitation arrangement." In making this claim, mother does not actually discuss the circumstances of this case, nor does she cite any legal authority. Instead, she rests on the proposition that a parent's failure to reunify does not justify a reduction in visitation. By itself, this generalization is insufficient to establish that the visitation order was erroneous.

IV.

FATHER'S PETITION

A. The Reasonable Services Finding

Father contends the juvenile court erred by finding that he was provided with reasonable reunification services. "We determine whether substantial evidence supports the trial court's finding, reviewing the evidence in a light most favorable to the prevailing party and indulging in all legitimate and reasonable inferences to uphold the court's ruling. [Citation.]." (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 598.)

" '[T]he focus of reunification services is to remedy those problems which led to the removal of the children.' [Citation.] A reunification plan must be tailored to the particular individual and family, addressing the unique facts of that family. [Citation.] A social services agency is required to make a good faith effort to address the parent's problems through services, to maintain reasonable contact with the parent during the course of the plan, and to make reasonable efforts to assist the parent in areas where compliance proves difficult. [Citation.] However, in most cases more services might

have been provided and the services provided are often imperfect. [Citation.] ‘The standard is not whether the services provided were the best that might be provided in an ideal world, but whether the services were reasonable under the circumstances.’ [Citation.]” (*Katie V. v. Superior Court, supra*, 130 Cal.App.4th at pp. 598-599.)

Applying these rules here, we affirm the reasonable services finding as to father. Substantial evidence establishes that the children were removed from father because of his relapse into chronic drug abuse, and that the bureau afforded reasonable services tailored to address that problem. Those services included supervised visitation once it became clear that father could not safely engage with the children in an unsupervised setting; random drug testing, which father failed to utilize for the majority of the reunification period; and referrals to a drug treatment program and to Narcotics Anonymous/Alcoholics Anonymous.

Without acknowledging the services that were provided to him, father contends the reasonable services finding must be reversed because there is “no evidence” that the bureau “tailored the services to address [his] diagnosed mental health needs, specifically, that he suffered from Bi-Polar Disorder, as well as Post Traumatic Stress Disorder.” However, father’s mental health conditions were not the problems which led the court to exercise dependency jurisdiction over the children. Prior to the initial detention hearing, father made assurances to the bureau social worker that he was receiving ongoing mental health services for his PTSD and bipolar disorder and that these conditions did not pose any safety concerns for his children. In his writ petition, father does not point to any evidence that contradicts the assurances he made at the beginning of the dependency proceedings.

Nor does the record support father’s contention that he had unaddressed mental health “needs” which impeded him from reunifying with his children. The subsequent petitions were filed because father relapsed into illegal drug addiction. The bureau provided father with services to address that problem, but he failed to utilize any of those services until very late in the proceedings, and thus was unable to demonstrate that he could provide the children with a safe and stable home.

B. Effective Assistance of Counsel

As noted in our factual summary, father testified at the status review hearing. After father completed his direct testimony, the court advised the parties it would take a 10-minute break before cross-examination, and it instructed father's counsel not to discuss father's testimony with him during that brief intermission. Father contends that the court's ruling deprived him of his due process right to the effective assistance of counsel.

"Under statutory law and court rules, an indigent parent in a dependency proceeding has a right to appointed counsel where out-of-home placement is an issue. [Citations.] 'There is also a due process constitutional right to representation by counsel on a case-by-case basis when the result of the hearing may be termination of parental rights.' . . ." (*In re Paul W.* (2007) 151 Cal.App.4th 37, 44-45, citing *In re Arturo A.* (1992) 8 Cal.App.4th 229, 238 (*Arturo A.*)).

Here, father contends that he had a due process right to the effective assistance of counsel at the status review because that proceeding resulted in the setting of a section 366.26 hearing to terminate his parental rights. (Citing *Arturo A.*, *supra*, 8 Cal.App.4th at p. 238.) However, father does not cite any authority recognizing a parent's due process right to privately consult with counsel during the course of his or her testimony at a contested review hearing. Furthermore, assuming such a right exists, father does not explain how the challenged ruling prejudiced him.

In order to prove an ineffective assistance of counsel claim in a dependency case, the parent must prove prejudice by demonstrating that it is reasonably probable that he would have obtained a more favorable ruling if not for the alleged violation. (*Arturo A.*, *supra*, 8 Cal.App.4th at p. 243; see also *In re Kristen H.* (1996) 46 Cal.App.4th 1635, 1668 [violation of statutory right to counsel also reviewed under harmless error test].) Here father does not identify any ruling by the juvenile court that would have been more favorable to him had he been allowed to consult with his counsel during the 10-minute break in his testimony.

C. Denial of Additional Services

Like mother, father contends that he was entitled to additional reunification services. However, in making his argument father mistakenly characterizes the September 2015 hearing as a standard six-month status review. As discussed above, when the juvenile court finally completed its status review, the 12-month review date was only a week away. Therefore, by necessity, the decision whether to extend the reunification period was governed by section 366.21, subdivision (g), which authorizes the juvenile court to extend services to the 18-month deadline only if (1) reasonable services have not been afforded, or (2) there is a substantial probability the children will be returned to the physical custody of their parents and “safely maintained in the home within the extended period of time.”

We have already affirmed the juvenile court’s finding that father was afforded reasonable services. We also conclude that substantial evidence supports the finding that it is not substantially probable that the children will be returned to father’s home if the reunification period is extended to the 18-month deadline. Father has a long history of drug abuse and drug related convictions, which includes a definite pattern of relapsing into behavior which would preclude him from providing his children with a safe home. Father’s most recent relapse occurred while he was receiving family maintenance services and while mother was out of the home and receiving reunification services. Father managed to keep his relapse a secret from the bureau and the court for several weeks before he was drug tested at the disposition hearing. Then, after the children were removed from his custody, father completely failed to engage in any addiction related services for the majority of the reunification period. Father did finally accept drug treatment services and began drug testing, but not until late in the reunification process.

In light of father’s extensive history of drug abuse and drug related criminal convictions, the circumstances surrounding his most recent relapse, and his ongoing dysfunctional relationship with mother, the juvenile court could reasonably have found that father’s participation in another residential drug treatment program was insufficient

to establish a substantial likelihood that the children could be returned to their parents' custody by the 18-month deadline.

V.

DISPOSITION

The separate petitions for extraordinary relief filed by mother and father are denied on the merits. Our decision is final as to this court immediately. (Cal. Rules of Court, rule 8.490(b)(2)(A).)

RUVOLO, P. J.

We concur:

RIVERA, J.

STREETER, J.